

3116 FAILURE TO COOPERATE: MATERIALITY

Question _____ inquires whether the failure of the insured, _____, to cooperate with the insurer, _____, in its defense was so material as to prejudice _____, the insurer.

By your answer to this question, you are to determine whether the (false statements) (false testimony) (were) (was) harmful, injurious, or damaging to _____, the insurer, to the extent that it was unable to make a thorough investigation so as to prepare an adequate defense or to make a just settlement.

The burden of proof with respect to this question is upon the insurer, _____, who contends that you should answer this question "yes."

COMMENT

This instruction and comment were approved by the Committee in 1967. The comment was updated in 1980 and revised in 2016.

To avoid liability, the insurer must also prove that the failure of the insured to cooperate is material and prejudicial. Ansul v. Employers Ins. Co. of Wausau, 345 Wis.2d 373, 393 (Ct. App. 2012). The insurer must demonstrate actual prejudice, not merely the possibility of prejudice. Foote v. Douglas County, 29 Wis.2d 602, 608 (1966).

"Where the rights of an injured third party have intervened subsequent to the issuance of the contract of insurance, the insurer should not be freed from liability to such third party on the ground of non-cooperation of the insured unless the insurer is harmed thereby." Kurz v. Collins, 6 Wis.2d 538, 551, 95 N.W.2d 365 (1958).

With respect to the defense of non-cooperation by a motor vehicle liability insurer, Wis. Stat. § 632.34 (1979) states that such defense is not effective against a third person making a claim, unless there was collusion between the third person and the insured, or unless the claimant was a passenger in the insured vehicle.

In Dietz v. Hardware Dealers Mut. Fire Ins. Co., 88 Wis.2d 496, 276 N.W.2d 808 (1979), the court cited from Kurz v. Collins regarding the relation between materiality and prejudice:

When it is stated that a false statement or testimony must be material in order to breach a policy co-operation condition, it means that the same must be material to the issue of the liability of the company on its policy. In a sense, whether a false statement or testimony is material to the insurance company's liability on its policy is closely akin to whether the company has been prejudiced thereby, but we deem materiality to be broader in scope than prejudice. Kurz v. Collins, *supra* at 546.

The burden of proof is on the insurer. Dietz v. Hardware Dealers Mut. Fire Ins. Co., 88 Wis.2d 496, 276 N.W.2d 808 (1979); Schauf v. Badger State Mut. Cas. Co., 36 Wis.2d 480, 153 N.W.2d 510 (1967); Foot v. Douglas Co., 29 Wis.2d 602, 607, 139 N.W.2d 628 (1965).

See also McDonnell v. Hestnes, 47 Wis.2d 553, 177 N.W.2d 845 (1970); Boschek v. Great Lakes Mut. Ins. Co., 19 Wis.2d 514, 520, 120 N.W.2d 703 (1962); Schneck v. Mutual Serv. Co., 18 Wis.2d 566, 576, 119 N.W.2d 342 (1962); Stippich v. Morrison, 12 Wis.2d 331, 336-7, 107 N.W.2d 125 (1960).

Where the insured's contradictory statements were exposed only 6 days before trial, a continuance should have been granted to allow the insurer a more exhaustive investigation based upon the effects of the new facts. Dietz v. Hardware Dealers Mut. Fire Ins. Co., *supra* at 507.

See also Comment, Wis JI-Civil 3115.